IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 31ST JANUARY 2007 / 11TH MAGHA 1928

AS.No. 676 of 1994()

OS.121/1990 of SUB COURT, TIRUR

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APPELLANTS/DEFENDANTS 2 TO 8 AND 13:

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1. KAZHUNGIL THAMASIKKUM DECEASED ALAVI'S CHILDREN MAMMI, KLARI AMSOM, TIRUR TALUK.

2. -DO- -DO- PAKKU -DO-

3. -DO- -DO- MOIDUTTY -DO-

4. PARAYIL THAMASIKKUM KAZHUNGIL PATHUMMA UMMA, RESIDING AT KODUR AMSOM DESOM, PERINTALMANNA TALUK.

5. VILLAN @ VEETTIL THAMASIKKUM KAZHUNGIL NABESSUMMA RESIDING AT CHERUR AMSOM, TIRUR TALUK.

6. CHOKKATTU THAMSIKKUM KAZHUNGIL AMINA UMMA, RESIDING AT KODUVAYUR AMSOM, ERNAD TALUK.

7. NEELIYATTU THAMASIKKUM KAZHUNGIL SAFIYA, RESIDING AT PONMUNDAM AMSOM DESOM, TIRUR TALUK.

8. NAMBIYARATHU KUNHI ABOOBACKER'S SON ALAVI, RESIDING AT KLARI AMSOM AND DESOM,TIRUR TALUK.

BY ADV. SRI.T. KRISHNAN UNNI

AS.No. 676 of 1994()

RESPONDENTS/PLAINTIFF& DEFENDANTS NOS. 1, 9,10,11,12 & 14:
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*1. KAZHUNGIL DECEASED ALAVI'S DAUGHTER AYISHA UMMA, NELLIPOYIL AMSOM, KODENCHERI DESOM, KOZHIKODE TALUK.

(*DIED. LEGAL REPRESENTATIVES, ADDL. R8 to R10 AND ADDL. R11 ARE IMPLEADED).

2. KAZHUNGIL THAMASIKKUM DECEASED ALAVI'S WIFE AREEKKALCHOLA PATHUMMAKUTTY UMMA, KLARI AMSOM AND DESOM, TIRUR TALUK.

3. AVARANKUTTY'S CHILDREN, CHERUKATTIL ABOOBACKER, RESIDING AT KLARI AMSOM AND DESOM, TIRUR TALUK.

4. BROTHER MUHAMMEDKUTTY, -DO- -DO-

5. AREEKKALCHOLA MUHAMMED'S SON EANIKUTTY, KLARI AMSOM AND DESOM, TIRUR TALUK.

6. PUTHUKKATTI KUNHATTU HAJI'S SON VEERANKUTTY HAJI, PONMUNDAM AMSOM DESOM, TIRUR TALUK.

7. AREEKKALCHOLA MUHAMMED'S SON MUHAMMEDKUTTY , RESIDING AT -DO- -DO-

****ADDL.R8** P.K. ABU, S/O. PUNNAKKODAN AYDRU, RESIDING AT NELLIPPOYIL AMSOM, KODENCHERRY AMSOM, KOZHIKODE TALUK.

****ADDL.R9** P.A. MUNEERA, D/O. P.K. ABU & LATE AYISHA UMMA, RESIDING AT -DO- -DO-

****ADDL.R10** P.A. NAJEEMUDHEEN, S/O -DO- -DO-

AS.No. 676 of 1994()

(*****ADDL. RESPONDENTS NOS. 8 TO 10 ARE IMPLEADED AS LEGAL REPRESENTATIVES OF THE DECEASED 1ST RESPONDENT VIDE ORDER DATED 12.09.2002 ON C.M.P.No. 4434/2002)***

*****ADDL.R11** ILLIYAS P.A., S/O. P.K. ABU AND LATE AYISHA UMMA,
RESIDING AT NELLIPPOYIL AMSOM,
KODENCHERRY AMSOM,
KOZHIKODE TALUK.

*(***ADDL.RESPONDENT NO. 11 IS IMPLEADED AS THE LEGAL REPRESENTATIVE OF THE DECEASED 1ST RESPONDENT VIDE ORDER DATED 17.07.2003 ON C.M.P.No. 4435 of 2002.)*

BY ADV. SRI.A.P. CHANDRASEKHARAN
ADV. SMT. PRABHA R.MENON
ADV. SRI. PUSHPARAJAN KODOTH
ADV. SRI.M. KRISHNAKUMAR
ADV. SRI.K. JAYESH MOHANKUMAR
ADV. SRI.T. SETHUMADHAVAN

THIS APPEAL SUIT HAVING BEEN FINALLY HEARD ON 31/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.No. 4175 OF 1994 IN A.S.No. 676 OF 1994

DISMISSED.

31.01.2007 SD/- K.T. SANKARAN, JUDGE.

/true copy/

P.A. TO JUDGE

K.T. SANKARAN, J.

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A.S. No. 676 OF 1994

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Dated this the 31st January, 2007

J U D G M E N T

Defendants Nos. 2 to 8 and 13 in O.S.No. 121 of 1990 on the file of the court of the Subordinate Judge, Tirur are the appellants. They challenge the judgment and decree granting 7 shares out of 88 shares to the plaintiff in the plaint schedule properties.

2. The total extent of the properties sought to be partitioned is about 20 acres, comprising 11 items shown in the plaint schedule. The properties belonged to Alavi who died in the year 1971. The widow and children of deceased Alavi are first defendant, plaintiff and defendants Nos. 2 to 8. The plaintiff claimed that she is entitled to get 7/88 shares separately by a decree of partition.

3. The second defendant contended that the plaintiff is not entitled to get the relief of partition . His contention is that the properties left behind by Alavi were partitioned as per Ext.B1 partition deed dated 07.06.1977 and that an extent of 32 cents was allotted to the plaintiff. The respective parties took possession of the shares allotted to them as per the partition deed. The plaintiff did not put her signature in Ext.B1. It was

also contended that the respective parties in the partition deed are in possession of the shares allotted to them under the partition deed and the right, if any, of the plaintiff is lost by ouster and adverse possession.

4. The trial court held, under issue No.1, that the plaintiff is not bound by Ext.B1 partition deed since she is not a signatory to the deed. The second defendant who was examined as D.W.1 stated that there was an oral partition two weeks before the execution of Ext. B1 and that the partition so made was recognised and incorporated in the partition deed. It has come out in evidence that the plaintiff married a person against the wishes of the contesting defendants. According to the plaintiff, she had gone out of the family in the year 1973, while according to the second defendant, she left the house in February, 1977. D.W.1 stated in evidence that after February, 1977, he saw the plaintiff for the first time while she was examined in court. Ext.B1 partition deed was executed on 07.06. 1977. Therefore it is clear that at the time when the partition deed was executed, there was no occasion for the plaintiff to be present for any discussion or for measurement or for preparation of the share list. Even if the case of D.W1 that an oral partition took place 15 days prior to the execution of Ext. B1 is accepted as true, then also, there was no occasion

for the plaintiff to participate in such an oral partition, as even according to the second defendant, she had left the family house in February, 1977 and thereafter she had not returned to the house. The court below therefore rightly arrived at the conclusion that the plaintiff is not bound by Ext. B1 partition deed and that she is not precluded from claiming her legitimate share in the plaint schedule properties.

5. As regards the plea of ouster, adverse possession and limitation, the court below found that there are no sufficient materials and proof to accept such a contention. The court below held that there is no sufficient pleading for ouster. It is well settled that ouster must be specifically pleaded and proved. The contention raised by the second defendant is that the period of limitation begins to run from the date of execution of Ext. B1 and the suit, having been filed after a period of 12 years, is time barred. There is no case for the defendants that the plaintiff was put to knowledge of the execution of Ext.B1 partition deed. There is no case for the contesting defendants that the plaintiff was made known of the intention of the defendants to possess and enjoy the properties exclusively and in denial of the title of the plaintiff, in accordance with the allotment made in Ext.B1 partition deed. It is well settled that a secret hostile animus does

not constitute ouster or adverse possession. To constitute ouster, there must be clear manifestation of the intention of the defendants to possess and enjoy the properties adversely to the interests of the plaintiff who is admittedly a sharer. There is no such pleading or proof in the case. Therefore, the court below was right in holding that the defendants failed to prove that the title of the plaintiff is lost by ouster, adverse possession and limitation.

6. The other contention raised by the contesting defendants was that necessary parties were not impleaded in the suit. The said contention was raised on the ground that portion of the property was acquired by the Government and it was contended that the Government should be made a party. The property which was acquired was the property allotted to the 7th defendant under Ext. B1 partition deed. 7th defendant alone was made a party to the land acquisition proceedings and he received the compensation. The trial court held that the portion which was acquired by the Government shall be allotted to the share of the 7th defendant. I am of the view that the trial court was right in arriving at this finding.

7. Another contention raised by the defendants Nos. 9 to 11, who

are assignees of portions of the properties was that they are entitled to equities and reservation. The court below held that the defendants Nos. 9 to 11 are not bonafide purchasers. Had they perused Ext. B1, it would have been clear that the plaintiff was not a signatory to Ext. B1 partition deed and that she was not bound by the allotment made thereunder. Defendants 9 to 11 took the risk of purchasing co-ownership properties without the junction of all the co-owners. Therefore they cannot claim that they are entitled to enforce their rights as against the rights of the plaintiff. The court below rightly held that defendants Nos. 9 to 11 are not entitled to any reservation or equity. Moreover, defendants Nos. 9 to 11 have not challenged the judgment and decree of the trial court by filing an appeal.

The appeal is devoid of merits. There is no ground for interference in the well considered judgment of the court below . The appeal is accordingly dismissed. No order as to costs.

K.T. SANKARAN,
JUDGE.

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K.T. SANKARAN, J.

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A.S. No. 676 OF 1994

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Dated this the 31st January, 2007

J U D G M E N T